EX PARTE OR LATE FILED

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March 13, 1998

EX PARTE

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RE: Notice of Permitted Ex Parte Presentation in WT Docket No. 97-207; WT Docket 96-6

Dear Ms. Salas:

Pursuant to Section 1.1206(a)(2) of the Commission's Rules, Cole, Raywid & Braverman, L.L.P. ("CRB") hereby submits an original and one copy of this letter regarding a permitted *ex parte* presentation in the above-referenced docket.

Yesterday, Christopher W. Savage and Theresa A. Zeterberg of Cole, Raywid & Braverman, L.L.P., met with Paul E. Misener, senior legal advisor to Commissioner Furchtgott-Roth. The purpose of the meeting was to discuss the CMRS jurisdictional aspects of the captioned proceedings. Specifically, the attendees discussed the scope of the FCC's plenary jurisdiction over CMRS licensees, statutory sources of that jurisdiction, and whether and how this issue may be addressed in the captioned dockets and other relevant proceedings. CRB also provided Mr. Misener with a written copy of its position on this issue.

If you have any questions, please contact the undersigned.

Respectfully submitted,

Theresa A. Zeterberg

cc: Paul E. Misener

The Federal Communications Commission Has Plenary Jurisdiction Regarding LEC/CMRS Interconnection Matters

1. Introduction.

Various pending proceedings implicitly or explicitly raise the question of the scope of the Commission's jurisdiction over the terms of interconnection arrangements between local exchange carriers ("LECs") and Commercial Mobile Radio Services ("CMRS") providers. The clearest recent statement on the issue is in the *Local Interconnection Order* There, the Commission relied primarily on the negotiation/arbitration process of Sections 251 and 252 for the establishment of the terms of LEC/CMRS interconnection, as opposed to relying on the direct authority over such matters granted by Section 332.

The Eighth Circuit's decision on appeal from the *Local Interconnection Order* undercut the scope of the Commission's authority over interconnection, particularly interconnection pricing, under Sections 251 and 252. At the same time, the Eighth Circuit itself recognized the Commission's special authority over CMRS issues. Not only does Section 332(c)(1)(B) expressly give the Commission jurisdiction with regard to LEC/CMRS interconnection, Section 2(b) — which normally deprives the Commission of jurisdiction over "intrastate" matters — by its own, express terms does not apply to Section 332. This suggests that the Commission might want to re-examine its decision not to rely expressly and affirmatively on Section 332 as a basis for setting rules governing the terms of LEC/CMRS interconnection, including pricing terms.

In fact, the Eighth Circuit's order emphasizes the reasons that federal control over the terms of LEC/CMRS interconnection flows naturally from the face of the affected statutory provisions. Section 332(c)(1)(B) says that the Commission shall regulate LEC/CMRS interconnection under the terms of Section 201 of the Communications Act. Section 201 is the statutory provision primarily relied upon by the Commission in fashioning the access charge regime governing all aspects of interconnection with respect to interstate calls. The logical reading of Section 332(c)(1)(B), therefore, is that Congress intended the FCC to have jurisdiction

over LEC/CMRS interconnection in the same manner that it exercises jurisdiction over interstate access arrangements. The Eighth Circuit emphasized that Section 2(b) normally stands as an obstacle to Commission authority over intrastate matters. That court recognized, however, that Section 2(b) expressly states that its provisions do not apply to any part of Section 332. The natural reading of Section 332(c)(1)(B), therefore, is, the correct one — the Commission has plenary authority of all aspects of LEC/CMRS interconnection, irrespective of whether the traffic would be classified as "interstate" or "intrastate."

2. Section 332(c)(1)(B) Gives The Commission Authority To Regulate LEC/CMRS Interconnection Irrespective Of The Jurisdictional Status Of The Traffic.

The Commission has authority over the terms and conditions of LEC/CMRS interconnection. This plenary Commission authority — analogous to the Commission's authority to establish the terms and conditions of exchange access service for interstate communications under Section 201 of the Act — includes the authority to set LEC/CMRS interconnection rates; the authority to determine when and under what conditions a LEC may bill landline customers for making calls to CMRS customers; and the authority to require the LECs to provide billing information to CMRS providers and/or to require the LECs to bill on the CMRS provider's behalf on a non-discriminatory basis. As described below, moreover, this authority extends to interconnection arrangements for traffic that is jurisdictionally intrastate.

The Commission's authority to regulate the terms of LEC/CMRS interconnection arises primarily from Section 332(c)(1)(B) of the Communications Act. That Section provides:

> Upon reasonable request of any person providing [CMRS], the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

47 U.S.C. Section 332(c)(1)(B). Under this language, the scope of the Commission's authority under Section 201 is central to the analysis.

Even prior to the enactment of Section 332(c)(1)(B), the Commission had plenary authority under Section 201 to establish the terms on which carriers providing interstate telecommunications services connected to each other. Section 201(a) establishes "the duty of every common carrier in accordance with the orders of the Commission":

> to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. §201(a). The Commission has for more than two decades relied on its Section 201(a) authority to establish the terms and conditions under which LECs and other carriers must interconnect for handling interstate traffic.[1] Indeed, the Commission relied on Section 201 to establish the basic landline access charge regime under which landline LECs must provide billing data to, and bill for, interstate calls carried by interexchange carriers ("IXCs").[2] Nothing in Section 201 (or anywhere else in the Communications Act) suggests that the Commission lacks similarly broad authority in connection with interstate calls carried by CMRS providers.

The only real issue regarding the scope of the Commission's authority arises because most CMRS calls originate and terminate in the same state, and thus are not "interstate" communications under the terms of Section 3(22) of the Act.[3] As described below, the language

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[1] *See, e.g. Bell System Tariff Offerings,* 46 F.C.C.2d 413, 417-30 (1974), *affirmed, Bell Telephone Company of Pennsylvania v. FCC,* 503 F.2d 1250, 1264-68 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975).

[2] In the Matter of MTS and WATS Market Structure, *Third Report and Order,* 93 F.C.C.2d 214, 254-55 (¶¶ 36-41) (1983) (*"MTS.WATS Third Report"*) (discussing Commission's authority to establish "carrier's carrier" access charges under Section 201).

[3] Section 3(22) of the Act, 47 U.S.C. § 153(22), defines "interstate communication." There is no corresponding definition of "intrastate communication" in the Act.

and structure of the Act, the legislative history of relevant provisions, and the decision by the 8th Circuit in *Iowa Utilities Board v. FCC* all establish that the Commission may regulate the terms of LEC/CMRS interconnection irrespective of whether the traffic being exchanged is interstate or intrastate in nature.

At the outset, Section 332(c)(1)(B), the source of the Commission's specific authority with regard to LEC/CMRS interconnection, makes no distinction between "interstate" and "intrastate" CMRS calls. To the contrary, it simply says that the Commission "shall order" LEC/CMRS interconnection "pursuant to the provisions of Section 201." The only logical reading of this provision is that it applies equally to both interstate and intrastate CMRS traffic. Indeed, if it did not apply to both types of traffic, then Section 332(c)(1)(B) would have been entirely unnecessary. As noted above, at least since the early 1970s, the Commission has clearly held that it has the authority ***under Section 201*** to direct LECs to interconnect with other carriers for the purpose of facilitating the provision of interstate telecommunications services.[4] Section 332(c)(1)(B) would have been totally superfluous if the authority it conferred on the Commission to set the terms of LEC/CMRS interconnection were limited to interstate traffic.[5]

Other provisions of Section 332(c)(1)(B) confirm that Congress intended this law to expand the Commission's jurisdiction to include intrastate CMRS interconnection. Section 201, referred to in Section 332(c)(1)(B) as the provision "pursuant to" which the Commission should order interconnection, by its own terms (*i.e.*, without considering Section 332(c)(1)(B)) applies only to interstate traffic. Congress was apparently concerned that, except in connection with LEC/CMRS interconnection, Section 332 not be construed to expand the Commission's existing authority to order interconnection between carriers. Consequently, Congress stated that

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[4] *See, e.g., Bell System Tariff Offerings,* 46 F.C.C.2d 413, 417-30 (1974), *affirmed, Bell Telephone Company of Pennsylvania v. FCC,* 503 F.2d 1250, 1264-68 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975).

[5] For this reason, and for the reasons discussed below, it would make no sense to import the limitation to interstate traffic included in Section 201 into the LEC/CMRS interconnection context under Section 332(c)(1)(B).

> ***Except to the extent that the Commission is required to respond to*** [a CMRS interconnection request], this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

47 U.S.C. §332(c)(1)(B) (emphasis added). The only rational interpretation of this phrase is that, to the extent that the Commission ***is*** required to deal with LEC/CMRS interconnection issues, "this subparagraph," *i.e.,* Section 332(c)(1)(B), ***does*** constitute an "expansion of the Commission's authority to order interconnection pursuant to this Act." Since the Commission's authority to order interconnection under Section 201 with regard to ***interstate*** communications (including interstate LEC/CMRS traffic) was unquestioned and unquestionable, the only "expansion" of Commission authority that could possibly have been intended is "expansion" to include the terms and conditions of interconnection for the exchange of intrastate traffic.[6]

It follows that Section 332(c)(1)(B) gives the Commission authority to establish the terms of all LEC/CMRS interconnection, including interconnection arrangements for ***intrastate*** traffic over which the Commission may possibly have lacked authority prior to the adoption of that statute. To the extent that this new authority constitutes an expansion of

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[6] This view of the expansive effect of Section 332(c)(1)(B) is borne out by the legislative history of that section. The final language of Section 332(c)(1)(B) is the language contained in the House Bill on this issue. On this point, the Conference Report states that the House Bill "requires in Section 332(c)(1)(B) that the Commission shall order a common carrier to establish interconnection with ***any person***" providing CMRS, and that "[n]othing here shall be construed to expand or limit the Commission's authority under section 201, ***except as this paragraph provides.***" House Conf. Rep. No. 103-213 (103rd Cong., 1st Sess.) (1993) ("*Conference Report*") at 490-91 (emphasis added). The language precluding interpretation of Section 332(c)(1)(B) as a ***limitation*** on Commission authority was necessary in order to avoid an interpretation that Section 332(c)(1)(B) was the ***only*** possible basis for Commission authority over LEC/CMRS interconnection issues. For example, under well-settled preemption law, if the Commission were to conclude that its federal policies regarding CMRS service (*e.g.,* encouraging the development of the service as a direct substitute for landline service) were being frustrated by state-level regulation of LEC/CMRS interconnection, the Commission has the authority to pre-empt contrary state regulation. Clearly, Congress wanted to ensure that the specific treatment of LEC/CMRS interconnection in Section 332(c)(1)(B) was not construed as limiting the Commission's general ability to assert authority over LEC/CMRS interconnection in a situation involving conflict between state and federal regulatory goals.

Commission authority, the express language of Section 332(c)(1)(B) plainly shows that Congress expected and accepted such a result.

One could quibble, however, and argue that, since Section 332(c)(1)(B) does not literally and expressly state that the Commission has authority over intrastate LEC/CMRS interconnection, any conclusion that the Commission has such authority is a "construction" of Section 332(c)(1)(B). In that case, the familiar rule of Section 2(b) of the Act — that no provision of the Act should be "construed to apply or to give the Commission jurisdiction with respect to" intrastate matters — might stand as a bar to treating the Commission's authority as broad enough to encompass intrastate traffic.

This concern, however, was anticipated — and fully resolved — by Congress. The same bill that enacted Section 332(c)(1)(B) also ***amended*** Section 2(b). Specifically, the introductory clause of Section 2(b) was amended to read, "[e]xcept as provided in sections 223 through 277, inclusive, ***and section 332***, ..."[7] Section 332(c)(1)(B), therefore, is exempt from the normal rule of construction that bans Commission authority over intrastate matters. The normal, natural reading of that statute to cover ***all*** LEC/CMRS interconnection arrangements, both inter- and intrastate, therefore, is clearly the correct one, because Section 2(b)'s rule of construction expressly does not apply to Section 332 — including Section 332(c)(1)(B).

A die-hard opponent of Commission authority over LEC/CMRS interconnection arrangements for intrastate traffic could possibly claim that the exception to Section 2(b) was "really" intended as a sort of "belt-and-suspenders" provision to make especially sure that the ban on state regulation of CMRS ***end user rates*** contained in Section 332(c)(3) was not set aside on the basis of Section 2(b). Any such claim would be plainly erroneous, however.

First, the amendment to Section 2(b) exempts ***all*** of Section 332 from the normal "no intrastate jurisdiction" rule, not just Section 332(c)(3). One would have to suppose that Congress suddenly and unaccountably became sloppy in drafting legislation in this highly

[7] 47 U.S.C. § 152(b).

sensitive area to conclude that when it exempted all of Section 332, it "really" only "meant" to exempt Section 332(c)(3).

Second, Section 332(c)(3) contains its own exemption. Specifically, in Section 332(c)(3)(A), Congress itself expressly stated that "***[n]otwithstanding sections 2(b)*** and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by" any CMRS provider. In light of the emphasized language, no amendment to Section 2(b) is needed for Section 332(c)(3)(A). It would make no sense, therefore, read the actual Section 2(b) exemption, applicable to ***all*** of Section 332, to "really" only apply to the one portion of Section 332 for which no Section 2(b) exemption is needed at all.[8]

Third, the broad sweep of the Section 2(b) exemption for Section 332 is underscored by the legislative history of the amendment of Section 2(b) that brought the exception into being. The report of the Conference Committee regarding this question states as follows: "The Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act ***to clarify that the Commission has the authority to regulate commercial mobile services.*** ... The Conference Agreement adopts the Senate position."[9] In other words, the overriding purpose of enacting the Section 332 amendments — which included Section 332(c)(1)(B) — was to place CMRS services, jurisdictionally, in essentially the same position

[8] In this connection, the remainder of language from Section 332(c)(3)(B) just quoted — "no State or local government shall have any authority to regulate" CMRS rates and entry — is a plain congressional command that directly divests states of whatever regulatory authority in this area they might have previously had. No "construction" of the statute is necessary to achieve that result, so Section 2(b)'s "rule of construction" could never properly be applied to contradict Congress's plain language. Consequently, the only reasonable reading of the exemption from Section 2(b) is also the simplest and most natural: ***all*** of Section 332 — including Section 332(c)(1)(B) — is exempt from the normal rule of Section 2(b) banning "constructions" of the Act that give the Commission jurisdiction over intrastate matters.

[9] *Conference Report* at 497 (emphasis added).

as traditional interstate long distance services: squarely within the regulatory authority of the Commission, as opposed to the states.[10]

Finally, any residual doubt about the Commission's authority to regulate the terms of LEC/CMRS interconnection, including interconnection for the exchange of intrastate traffic, has been removed by the holding of the 8th Circuit's in *Iowa Utilities Board v. FCC*. The 8th Circuit panel in that case — clearly no supporter of broad Commission jurisdiction over intrastate matters — was nonetheless forced to admit that

> because section 332(c)(1)(B) gives the FCC authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue rules of special concern to the CMRS providers [so that the Commission's interconnection rules regarding CMRS] remain in full force and effect with respect to CMRS providers, and our order of vacation does not apply to them in the CMRS context.[11]

In light of the overall perspective of the *Iowa Utilities Board* court on Commission jurisdiction over intrastate matters, it is hard to imagine a principled conclusion that the Commission's jurisdiction is even ***less*** extensive than that court was prepared to acknowledge.[12]

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[10] The only exceptions to plenary ***Commission*** regulatory authority regarding CMRS are (a) are the limited "other terms and conditions" of the CMRS offerings expressly reserved to state jurisdiction, and (b) the provisions for a state re-acquiring rate regulation authority of CMRS offerings if certain market conditions are met, both included in Section 332(c)(3)(A).

[11] *Iowa Utilities Board* at n.21.

[12] A final claim that opponents of Commission authority might raise is that Section 332(c)(1)(B) literally only gives the Commission authority to order physical interconnection arrangements, but not any payment or related terms associated with such arrangements, which (under this view) would remain with the states. The difficulty with this analysis is that it makes Section 332(c)(1)(B)'s reference to Section 201 totally superfluous. When Section 332(c)(1)(B) was enacted, Congress was of course aware that the Commission had established the entire interstate access charge regime — involving ***both*** physical interconnection requirements ***and*** associated payment arrangements — on the strength of Section 201. If Congress had meant to limit the Commission's CMRS interconnection authority to physical interconnection arrangements, it need only have stated in Section 332(c)(1)(B) that the Commission shall "order a common carrier to establish physical connections with" CMRS

(continued...)

In sum, several factors confirm that the Commission's authority regarding LEC/CMRS interconnection issues encompasses both jurisdictionally interstate and jurisdictionally intrastate communications. These include the plain language of Section 332(c)(1)(B), which does not limit the Commission's authority to interstate matters, and which expressly contemplates an expansion of Commission authority; the plain language of Section 2(b), which exempts ***all*** of Section 332 from the rule against construing the Act to give the Commission jurisdiction over intrastate traffic; the legislative history of both Section 332(c)(1)(B) and the Section 2(b) exemption, which make clear that Congress intended to give the Commission extensive authority to regulate CMRS; and the 8th Circuit's ruling expressly holding that Section 332 gives the Commission authority to issue rules regarding intrastate LEC/CMRS interconnection issues.

3. The Commission's Authority Over LEC/CMRS Interconnection Extends To "Through Route" Pricing And Billing Issues.

Section 332(c)(1)(B) directs the Commission to require LECs to establish "physical connections" with CMRS providers "pursuant to the provisions of Section 201 of this Act." Section 201, of course, is the statutory basis upon which the Commission based the creation of interstate access service at the time of the divestiture of the Bell companies from AT&T, and earlier LEC/IXC interconnection arrangements. That is, the Commission had (and used) its authority under Section 201 to order the local Bell companies to establish physical connections

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[12](...continued)
service, without any reference to Section 201. Instead, Congress included a broad reference to "the provisions of Section 201" "pursuant to" which physical interconnection "shall" be ordered, which on its face includes the rate-setting authority associated with physical interconnections contained in Section 201. In this regard, because Section 2(b) does not apply to Section 332(c)(1)(B), the natural, logical reading of that section — that the full scope of the Commission's Section 201 authority applicable to interstate interconnection arrangements now also applies to all LEC/CMRS interconnection arrangements — is clearly the reading that most comports with the language of the statute, as well as Congress's intent.

with MCI and other competing interexchange carriers, and to establish the rates, charges, and other terms and conditions applicable to those physical connections.[13]

As noted above, Section 201(a) establishes "the duty of every common carrier in accordance with the orders of the Commission":

> to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. §201(a).

In establishing access charges for landline interexchange calls, the Commission specifically determined that a jointly-provided interexchange call was an example of a "through route" referred to in Section 201(a). As the Commission noted, a "through route" refers to a situation in which an end user receives the ability to call between two points utilizing the facilities and services of more than one carrier.[14] A typical long distance call involves a "through route" arrangement between the originating LEC, the IXC, and the terminating LEC. Similarly, completion of a landline-to-CMRS call involves a "through route" between the landline LEC and the CMRS provider.

By virtue of Section 332(c)(1)(B) and the exemption in Section 2(b), Section 201(a) applies to LEC/CMRS arrangements for the exchange of both interstate and intrastate traffic. Section 201(a) gives the Commission complete authority regarding carrier-to-carrier through routes. The Commission may direct carriers "to establish through routes." The

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[13] *See* In the Matter of MTS and WATS Market Structure, *Third Report and Order*, 93 F.C.C.2d 214, 254-55 (¶¶ 36-41) (1983) ("*MTS.WATS Third Report*") (discussing Commission's authority to establish "carrier's carrier" access charges under Section 201).

[14] *MTS/WATS Third Report* at nn. 15-16 and accompanying text.

Commission may establish "charges applicable thereto."[15] Moreover, the Commission may establish "the divisions of such charges" as between the participating carriers. This statutory authority allows the Commission to decide whether end users making a landline-to-CMRS call may be billed by the LEC, the CMRS provider, or both, and to determine how any amounts collected from the end user are to be divided up between the two carriers.

In the case of the "through routes" involved in landline long distance calling, the end user is billed by (or on behalf of) the IXC, which then remits access charges to the originating and terminating LECs. In the case of the "through routes" involved in landline-LEC-to-CMRS calls today, the landline LEC typically charges its end user any applicable local usage charges (which may be zero, or may involve a message unit or similar charge) for calling the CMRS customer, and then (pursuant to the Commission's local interconnection order addressed in the *Iowa Utilities Board* case) compensates the CMRS provider a small amount for terminating the call, while the CMRS provider receives additional compensation from the called party.[16]

The Commission's broad Section 201 authority over the establishment of through routes and the division of any charges made for through route-related services gives the Commission the authority to require LECs to establish a "Calling Party Pays" option in the case of landline calls to CMRS customers. On the other hand, the Commission equally has the authority to establish a "calling party never pays" requirement that would bar landline LECs from charging their end users for any calls to a CMRS customer. Either of these regimes would simply reflect different ways of charging for the through route service.

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[15] Of course, the strong policy against establishing rate regulation for CMRS calls in Section 332(c)(3) would apply to any end user charges for through route arrangements involving CMRS providers.

[16] In some cases today, the landline LEC charges end users an intraLATA toll rate for calling a CMRS customer, although many (if not most) LECs offer arrangements by which the CMRS provider may "buy down" these toll charges. All of these arrangements reflect different types of charging for jointly-provided service, and all of them are subject to the Commission's jurisdiction over LEC/CMRS "through routes."

In this regard, the Commission has the authority to impose a requirement that a LEC whose customers originate calls to CMRS providers must generate and provide to the CMRS provider data sufficient for the CMRS provider to bill the landline caller for the call, as well as a requirement that the LEC itself include such charges in its bills on terms and conditions substantially the same as the LEC offers to interexchange carriers using the LEC to bill end users for long distance calls. This latter requirement would simply mirror the Commission's traditional exercise of jurisdiction over billing and collection practices of landline LECs in connection with landline interstate toll calls.

Any through route arrangement raises the question of compensating the participating carriers for their services in completing the "through route" call. Here, the question would be how to divide total end user revenues between the LEC and the CMRS provider. In light of the Commission's consistent treatment of CMRS providers as offering local service, the Commission's normal rules for interconnection arrangements under Section 251 should apply. If the call is an intra-MTA call, it should be treated as "local" as between the LEC and the CMRS provider, and the LEC should compensate the CMRS provider for terminating such calls just like any other local calls. If the call is an inter-MTA call, it may be treated as a non-local call, and — as under current LEC/CMRS interconnection rules — the LEC may assess the CMRS provider appropriate interstate or intrastate access charges.